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6 IN THE COURT OF APPEALS
7 OF THE STATE OF WASHINGTON
8 DIVISION II

9 IN RE THE PERSONAL RESTRAINT
10 PETITION OF:

11 SHAMARR PARKER,

12 Petitioner.

NO. 45163-8

STATE'S RESPONSE TO PERSONAL
RESTRAINT PETITION

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15 A. ISSUES PERTAINING TO PETITIONER'S PERSONAL RESTRAINT
16 PETITION:

- 17 1. Should this Court dismiss the petition because petitioner failed to show that
18 he was actually prejudiced by any constitutional error or that a fundamental
19 defect in his trial resulted in a complete miscarriage of justice?
- 20 2. Has petitioner failed to show that the prosecutor committed misconduct in
21 closing argument or that he suffered any prejudice from the allegedly
22 improper remarks?
- 23 3. Has petitioner failed to show that the trial court abused its discretion in
24 admitting evidence that it found admissible under hearsay exceptions or that
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1 he suffered any prejudice from its admission when it was cumulative of
2 properly admitted evidence?

- 3 4. Has petitioner failed to show that he received ineffective assistance of
4 appellate counsel when he has failed to show that any meritorious claim
5 was overlooked on direct appeal?
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7 B. STATUS OF PETITIONER:

8 Petitioner, SHAMARR PARKER, is restrained pursuant to a judgment and
9 sentence entered in Pierce County Cause No. 08-1-06144-4 following a jury trial.

10 Appendix A. Petitioner was convicted of kidnapping in the first degree and robbery in the
11 first degree; the jury was unable to reach unanimous agreement on a rape in the first degree
12 charge and it was ultimately dismissed. Appendix B. Petitioner appealed his convictions
13 alleging that there was insufficient evidence to support both of his convictions because the
14 restraint used in the kidnapping was incidental to the robbery; the Court of Appeals
15 rejected this argument and affirmed his convictions in an unpublished decision. Appendix
16 B. The mandate issued on July 12, 2012. Appendix C (COA Case No. 40793-1).¹
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18 On July 11, 2013, petitioner filed a timely first personal restraint petition alleging
19 that: 1) prosecutorial misconduct in closing argument deprived him of his right to a fair
20 trial; 2) the trial court erred in allowing hearsay into evidence; 3) petitioner's appellate
21 counsel was ineffective for not raising these claims on direct appeal.

22 The State has no information with which to dispute a claim of indigency.
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¹ The clerk failed to indicate the date the mandate issued on the mandate, so that date was ascertained by consulting the court records in ACORDS.

1 C. ARGUMENT:

- 2 1. THE PETITION MUST BE DISMISSED BECAUSE PETITIONER
3 FAILS TO MEET HIS HEAVY BURDEN OF SHOWING
4 PREJUDICIAL CONSTITUTIONAL ERROR OR A COMPLETE
5 MISCARRIAGE OF JUSTICE NECESSARY TO OBTAIN
6 COLLATERAL RELIEF.

7 Personal restraint procedure has its origins in the State's habeas corpus remedy,
8 guaranteed by article 4, section 4, of the State Constitution. Fundamental to the nature of
9 habeas corpus relief is the principle that the writ will not serve as a substitute for appeal. A
10 personal restraint petition, like a petition for a writ of habeas corpus, is not a substitute for
11 an appeal. *In re Personal Restraint of Hagler*, 97 Wn.2d 818, 823 24, 650 P.2d 1103
12 (1982). Collateral relief undermines the principles of finality of litigation, degrades the
13 prominence of the trial, and sometimes costs society the right to punish admitted offenders.
14 These are significant costs, and they require that collateral relief be limited in state as well
15 as federal courts. *Id.*

16 In this collateral action, the petitioner has the duty of showing constitutional error
17 and that such error was actually prejudicial. The rule that constitutional errors must be
18 shown to be harmless beyond a reasonable doubt has no application in the context of
19 personal restraint petitions. *In re Personal Restraint of Mercer*, 108 Wn.2d 714, 718 21,
20 741 P.2d 559 (1987); *Hagler*, 97 Wn.2d at 825. Mere assertions are insufficient in a
21 collateral action to demonstrate actual prejudice. Inferences, if any, must be drawn in
22 favor of the validity of the judgment and sentence and not against it. *Hagler*, 97 Wn.2d at
23 825, 26. To obtain collateral relief from an alleged nonconstitutional error, a petitioner
24 must show "a fundamental defect which inherently results in a complete miscarriage of
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1 justice.” *In re Personal Restraint of Cook*, 114 Wn.2d 802, 812, 792 P.2d 506 (1990).

2 This is a higher standard than the constitutional standard of actual prejudice. *Id.* at 810.

3
4 Reviewing courts have three options in evaluating personal restraint petitions:

- 5 1. If a petitioner fails to meet the threshold burden of showing actual
6 prejudice arising from constitutional error or a fundamental defect
7 resulting in a miscarriage of justice, the petition must be dismissed;
- 8 2. If a petitioner makes at least a prima facie showing of actual
9 prejudice, but the merits of the contentions cannot be determined
10 solely on the record, the court should remand the petition for a full
11 hearing on the merits or for a reference hearing pursuant to RAP
12 16.11(a) and RAP 16.12;
- 13 3. If the court is convinced a petitioner has proven actual prejudicial
14 error, the court should grant the personal restraint petition without
15 remanding the cause for further hearing.

16 *In re Personal Restraint of Hews*, 99 Wn.2d 80, 88, 660 P.2d 263 (1983).

17 In a personal restraint petition, “naked castings into the constitutional sea are not
18 sufficient to command judicial consideration and discussion.” *In re Personal Restraint of*
19 *Williams*, 111 Wn.2d 353, 365, 759 P.2d 436 (1988) (citing *In re Personal Restraint of*
20 *Rozier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986), which quoted *United States v.*
21 *Phillips*, 433 F.2d 1364, 1366 (8th Cir. 1970)). That phrase means “more is required than
22 that the petitioner merely claim in broad general terms that the prior convictions were
23 unconstitutional.” *Williams*, 111 Wn.2d at 364. The petition must also include the facts
24 and “the evidence reasonably available to support the factual allegations.” *Id.*

25 Personal restraint petition claims must be supported by affidavits stating particular facts,
certified documents, certified transcripts, and the like. *Williams*, 111 Wn.2d at 364. If the
petitioner fails to provide sufficient evidence to support his challenge, the petition must be
dismissed. *Williams*, 111 Wn.2d at 364. A reference hearing is not a substitute for the

1 petitioner's failure to provide evidence to support his claims. As the Supreme Court
2 stated, "the purpose of a reference hearing is to resolve genuine factual disputes, not to
3 determine whether the petitioner actually has evidence to support his allegations." *In re*
4 *Personal Restraint of Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992). "Bald assertions
5 and conclusory allegations will not support the holding of a hearing," but the dismissal of
6 the petition. *Rice*, at 886, *Williams*, at 364-365.

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8 2. PETITIONER FAILED TO SHOW THAT THE PROSECUTOR
9 COMMITTED MISCONDUCT IN CLOSING ARGUMENT OR
10 THAT HE SUFFERED ANY PREJUDICE FROM THE
11 ALLEGEDLY IMPROPER REMARKS.

12 To prove that a prosecutor's actions constitute misconduct, the petitioner must
13 show that the prosecutor did not act in good faith and the prosecutor's actions were
14 improper. *State v. Manthie*, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (citing *State v.*
15 *Weekly*, 41 Wn.2d 727, 252 P.2d 246 (1952)). Petitioner has the burden of establishing
16 that the alleged misconduct is both improper and prejudicial. *State v. Stenson*, 132 Wn.2d
17 668, 718, 940 P.2d 1239 (1997); *State v. Gentry*, 125 Wn.2d 570, 640, 888 P.2d 570
18 (1995), citing *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). On a direct
19 appeal, a defendant who establishes misconduct is not entitled to relief unless the appellate
20 court determines there is a substantial likelihood the misconduct affected the jury's verdict.
21 *Id.* at 718-19. If a curative instruction could have cured the error and the defense failed to
22 request one, then reversal is not required. *State v. Binkin*, 79 Wn. App. 284, 293-294, 902
23 P.2d 673 (1995), *overruled on other grounds by*, *State v. Kilgore*, 147 Wn.2d 288, 53 P.3d
24 974 (2002). Failure by the defendant to object to an improper remark constitutes a waiver
25 of that error unless the remark is deemed so "flagrant and ill-intentioned that it evinces an

1 enduring and resulting prejudice that could not have been neutralized by an admonition to
2 the jury.” *Stenson*, 132 Wn.2d at 719, citing *Gentry*, 125 Wn.2d at 593-594.

3 In addition to the general principal of issue preservation, it is important for trial
4 counsel to object to improper argument. Timely objections serve to discourage a
5 prosecutor from escalating improper comments on a topic or theme that has been rejected
6 by the court. *See, e.g., State v. Warren*, 165 Wn.2d 17, 195 P. 3d 940 (2008). Proper
7 objections may stop repetitive or continuing improper questions or argument in trial. *See*
8 *e.g., State v. McKenzie*, 157 Wn.2d 44, 53 n. 2, 134 P.3d 221 (2006). A timely objection
9 gives the trial court the opportunity to instruct the jury or otherwise cure the error, insuring
10 a fair trial and avoiding a costly retrial. *See, e.g., Warren*, 165 Wn.2d at 25. The trial
11 court is in the best position to determine whether misconduct or improper argument
12 prejudiced the defendant. *See Stenson*, 132 Wn.2d at 718. In other words, the best time
13 and place to address an improper argument is in the trial court, where the court can take
14 remedial action.

16 Failure to object or move for mistrial at the time of the argument “strongly suggests
17 to a court that the argument or event in question did not appear critically prejudicial to an
18 appellant in the context of the trial.” *State v. Swan*, 114 Wn.2d 613, 661, 790 P. 2d 610
19 (1990); *see also State v. Monday*, 171 Wn.2d 667, 679, 257 P.3d 551 (2011). In *Swan*, the
20 Court further observed that “[c]ounsel may not remain silent, speculating upon a favorable
21 verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a
22 motion for new trial or on appeal.” *Id.*, quoting *Jones v. Hogan*, 56 Wn.2d 23, 27, 351
23 P.2d 153 (1960).
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1 When reviewing an argument that has been challenged as improper, the court
2 should review the context of the whole argument, the issues in the case, the evidence
3 addressed in the argument, and the instructions given to the jury. *State v. Russell*, 125
4 Wn.2d 24, 85-6, 882 P.2d 747 (1994), citing *State v. Graham*, 59 Wn. App. 418, 428, 798
5 P.2d 314 (1990); *State v. Green*, 46 Wn. App. 92, 96, 730 P.2d 1350 (1986). “Remarks of
6 the prosecutor, even if they are improper, are not grounds for reversal if they were invited
7 or provoked by defense counsel and are in reply to his or her acts and statements, unless
8 the remarks are not a pertinent reply or are so prejudicial that a curative instruction would
9 be ineffective.” *Russell*, 125 Wn.2d at 86, citing *State v. Dennison*, 72 Wn.2d 842, 849,
10 435 P.2d 526 (1967). The prosecutor is entitled to make a fair response to the arguments
11 of defense counsel. *Russell*, 125 Wn.2d at 87.

13 In a direct appeal, “[p]rejudice is established only if there is a substantial likelihood
14 the instances of misconduct affected the jury's verdict.” *State v. Pirtle*, 127 Wn.2d 628,
15 672, 904 P.2d 245 (1995)(citing *State v. Evans*, 96 Wn.2d 1, 5, 633 P.2d 83 (1981)). In a
16 collateral attack, the petitioner must demonstrate that he was actually and substantially
17 prejudiced by constitutional error or that there was a fundamental defect resulting in a
18 complete miscarriage of justice. *In re Personal Restraint of Gentry*, ___ Wn.2d ___, ___
19 P.3d ___, (2014) (Supreme Ct. Case No. , issued 1/23/2014, slip opinion at p. 15); *Cook*,
20 114 Wn.2d at 810, 792 P.2d 506; *In re Personal Restraint of Lord*, 123 Wn.2d 296, 303,
21 868 P.2d 835.

23 Petitioner contends that the prosecutor engaged in improper argument seven times
24 during closing argument and twice more during rebuttal. Brief in Support of Petition at pp.
25 22-25. Of these nine alleged instances of improper argument only four were preserved for

1 review by an objection in the trial court, RP 672, 686, 780, 713. As in a direct appeal, the
2 failure to object to the argument in the trial court, waives any claim of error unless the
3 remark was so “flagrant and ill-intentioned that it evinces an enduring and resulting
4 prejudice that could not have been neutralized by an admonition to the jury.” *Stenson*, 132
5 Wn.2d at 719. The Washington Supreme Court has stated that “[r]eviewing courts should
6 focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more
7 on whether the resulting prejudice could have been cured” because the critical question is
8 “has such a feeling of prejudice been engendered or located in the minds of the jury as to
9 prevent a [defendant] from having a fair trial?” *State v. Emery*, 174 Wn.2d 741, 278 P.3d
10 653 (2012). Petitioner fails to address this differing standard for his alleged instances of
11 misconduct that were not objected to below. *See* Brief in support of petition at pp. 22-25
12 alleging error at RP 671, 678, 779. He makes no argument as to how these comments -
13 which asked the jury to consider the victim's terror as the incident was occurring and
14 consider how she had to re-live the incident over and over each time she had to repeat what
15 happened to her - were so flagrant and ill intentioned that *no* curative instruction could
16 have eliminated the prejudice. As petitioner has not met his burden of showing improper
17 argument that no instruction could have eliminated the prejudice, these claims are waived
18 by lack of an objection in the trial court.
19

20 As for the four instances of alleged misconduct that were preserved in the trial
21 court, all of the objections were overruled; thus the trial court did not find them to be
22 improper argument in the context of the trial. RP 672, 686, 713, 780. The first argument
23 that drew an objection was:
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1 Then the defendant says, "take off your clothes." She does so because he
2 has that knife. Imagine her terror sitting there next to naked in this empty
field, nowhere to run, nobody to help, no phone to call for help.

3 RP 672. This description is based upon the victim's testimony as to how defendant drove
4 her to an isolated field and forced her to disrobe at knife point. RP 189-197. Petitioner
5 argues that this is improper under *State v. Claflin*, 38 Wn. App. 847, 690 P.2d 1186
6 (1984). In *Claflin*, during closing argument the prosecutor read a poem written by an
7 anonymous rape victim to show how one of Claflin's victim's "probably felt." *Id.* at 849.
8 The poem used vivid, but inflammatory, imagery and "contained many prejudicial
9 allusions to matters outside the actual evidence against Claflin." *Id.* at 851. The court
10 found that the poem was nothing but an appeal to passion and prejudice and that no
11 curative instruction could have erased the prejudice. *Id.* In reaching this holding,
12 however, the court noted that "reference to the heinous nature of a crime and its effect on
13 the victim can be proper argument[.]" *Id.* at 849-50, citing *State v. Fleetwood*, 75 Wn.2d
14 80, 84, 448 P.2d 502 (1968) and *State v. Buttry*, 199 Wash. 228, 251, 90 P.2d 1026 (1939).
15 In petitioner's case, the prosecutor did not introduce highly inflammatory imagery that was
16 based on matters outside the record, but made reference to the facts of the crime as
17 supported by the evidence and its impact on the victim. The same can be said of the next
18 challenged remark describing what the victim experienced as a "waking nightmare." RP
19 686. This description may border on the dramatic, but petitioner fails to show that the
20 language used is inflammatory or that it is not reasonably accurate description based upon
21 the victim's testimony that she was kidnapped, taken to an isolated location, forced to strip,
22 robbed, and raped at knife point. Petitioner has failed to show these comments were
23 improper.
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1 Petitioner complains that the prosecutor improperly shifted the burden of proof by
2 arguing that "it is no longer reasonable to doubt that the defendant is guilty." RP 713.
3 This comment came after lengthy argument about the evidence presented at trial and the
4 credibility of witnesses, RP 673-685, 686-698, 706-709, and argument as to how "the
5 State had proved each and every element" of the kidnapping, rape, and robbery charges
6 "beyond a reasonable doubt." RP 710, 711. Looking at this comment in context, it is
7 important to note that it came at the beginning of the final paragraph of the prosecutors
8 closing argument; clearly the prosecutor is asking the jury to find the defendant guilty
9 based on the evidence in the case and because the State has *met* its burden of proof.
10 Throughout the closing argument, the prosecutor acknowledged that the State had the
11 burden of proof beyond a reasonable doubt. RP 674-675, 676, 710, 711, 712. A
12 summation that asks the jury to find the defendant guilty because the State has met its
13 burden is not improper. Moreover, a jury is presumed to follow the court's instructions.
14 *State v. Hopson*, 113 Wn.2d 273, 287, 778 P.2d 1014 (1989). The court's instructions
15 properly informed the jury of the standard of proof and that it was the State's burden to
16 prove the elements of the crime beyond a reasonable doubt. Appendix D. Petitioner fails
17 to explain how this argument could have confused the jury as to who had the burden when
18 the court's instructions were clear. Even if the argument was improper, petitioner cannot
19 show that it had any prejudicial impact on the verdict in light of the court's instructions.
20 He has failed to show any error on this claim of improper shifting of the burden.
21

22 Finally, petitioner argues that the prosecutor's argument in rebuttal that the victim
23 had "weathered two storms" by "[w]hat she suffered at [defendant's] hands and what she
24 suffered on this stand --", *see* RP 779, was an improper comment on his rights to trial and
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1 confrontation. This comment came in rebuttal after the defense had spent its entire closing
2 arguing that the victim was a liar who made up the story about the rape and kidnapping so
3 she wouldn't get in trouble with her mother for being out past curfew and that she made up
4 these lies about the defendant because he had robbed her of her marijuana. RP 713-758.
5 The defense cross-examination of the victim had tried to paint her a marijuana-using thief
6 who would lie so she could do whatever she wanted to do without getting into trouble for
7 it. RP 264-340. Several times the court stopped the defense from engaging in improper
8 impeachment or argumentative questioning, RP 264-65, 266-70, 272, 335-336. Thus, it is
9 beyond dispute that the focus of the defense case was not just to cast doubt on the
10 reliability of the victim's testimony but to convince the jury that the victim was purposely
11 lying to get the petitioner into trouble and to keep herself out of it. In light of the issues in
12 the case, the comment of the prosecutor in rebuttal was a fair response to the defense case.
13 Petitioner does not explain why a juror hearing this comment would immediately interpret
14 it as a reference to the petitioner's trial or confrontation rights. Nor does he explain how
15 this argument would persuade a jury to convict simply because petitioner took his case to
16 trial and challenged the State's evidence. Thus, petitioner has failed to show that the
17 challenged comment was improper.
18

19 Finally, petitioner has failed to show that he was actually and substantially
20 prejudiced by any of the alleged misconduct in closing argument. Petitioner was charged
21 with three crimes - rape, robbery, and kidnapping. The defense conceded that the
22 petitioner was guilty of the robbery, although it asked the jury to find him guilty of second
23 degree robbery rather than first degree. RP 752, 754. In sum, only the kidnapping and
24 rape charges were contested. The jury convicted on the kidnapping, but could not reach
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1 agreement on the rape charge. Appendix B. This indicates that the jury was carefully
2 examining the evidence in the case and holding the State to its burden of proof on each
3 count in reaching its verdicts. The verdicts suggest that the jury was not willing to convict
4 solely on the testimony of the victim, but wanted some corroborating evidence; it
5 apparently found sufficient corroborating evidence for the kidnapping, but not on the rape.
6 This split result undermines petitioner's argument that the alleged misconduct caused the
7 jury to place themselves in the victim's shoes by appealing to their passion and sympathy.
8 It also indicates that the jury did not draw any negative inference against the petitioner
9 because he took his case to trial. Even assuming that petitioner could show the arguments
10 to be improper, he has not shown that he was actually and substantially prejudiced by
11 them. This claim should be dismissed.
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14 3. PETITIONER FAILS TO SHOW THE TRIAL COURT ABUSED
15 ITS DISCRETION IN ADMITTING EVIDENCE UNDER
16 EXCEPTIONS TO THE HEARSAY RULE AND FAILS TO
17 SHOW THAT THE ADMISSION OF THIS EVIDENCE ,
WHICH WAS CUMULATIVE OF OTHER,
UNQUESTIONABLY ADMISSIBLE EVIDENCE, CAUSED
HIM ANY ACTUAL PREJUDICE.

18 The Confrontation Clause prohibits the admission of testimonial hearsay without an
19 opportunity to cross-examine the declarant. *Crawford v. Washington*, 541 U.S. 36, 59,
20 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). But neither the confrontation clause nor
21 *Crawford* is implicated by the use of out of-court statements when the declarant testifies
22 and is available for cross-examination at a trial. 541 U.S. at 59 n. 9.

23 Petitioner raises challenges to the introduction of A.W.'s out of court statements to
24 her mother, T.M., and to Cheryl Killen, a nurse who examined A.W. at the hospital. As
25 noted above, only "testimonial" statements implicate the confrontation clause. *Crawford v.*

1 **Washington**, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Petitioner offers
2 no argument that the challenged statements were "testimonial" in nature. Moreover, as
3 A.W. testified at petitioner's trial and was subject to cross examination, RP 166-261, 262-
4 340, 356-57, it is clear that his claims are ones of non-constitutional evidentiary error. For
5 a petitioner to prevail on collateral review on a claim of evidentiary error, the petitioner
6 must show that an error occurred and that it constitutes a fundamental defect amounting to
7 a miscarriage of justice. **In re Personal Restraint of Morris**, 176 Wn.2d 157, 168-169,
8 288 P.3d 1140 (2012); **In re Personal Restraint of Pirtle**, 136 Wn.2d 467, 489, 965 P.2d
9 593 (1998); **In re Personal Restraint of Cook**, 114 Wn.2d 802, 811, 792 P.2d 506 (1990).

10
11 Evidentiary rulings are reviewed under an abuse of discretion standard; a trial
12 court's evidentiary ruling is an abuse of discretion only if it is "manifestly unreasonable or
13 based upon untenable grounds or reasons." **Morris**, 176 Wn.2d at 169 (quoting **State v.**
14 **Powell**, 126 Wn.2d 244, 258, 893 P.2d 615 (1995)).

15
16 a. Petitioner has not shown the trial court abused its discretion
in admitting the victim's excited utterances to her mother.

17 Petitioner complains that the testimony of the victim's mother, T.M., occurring at
18 RP 121-24, was hearsay and improperly admitted. Although hearsay is generally
19 inadmissible, ER 803(a)(2) provides that certain excited utterances may be admissible.
20 **State v. Magers**, 164 Wn.2d 174, 187, 189 P.3d 126 (2008). A statement qualifies as an
21 excited utterance if "(1) a startling event occurred, (2) the declarant made the statement
22 while under the stress or excitement of the event, and (3) the statement relates to the
23 event." *Id.* at 187-88.
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1 While the trial court in this case did not expressly state it was admitting the
2 challenged statements as excited utterances, that is the only reasonable conclusion from a
3 fair reading of the trial record. The record shows that the prosecution was laying the
4 foundation to establish statements A.W. made to her mother when she first got home after
5 being victimized were ones that fell under the excited utterance exception to the hearsay
6 rule. RP 96-119. The prosecutor established that A.W. was crying and hysterical and that
7 she collapsed to the floor when her mother opened the door to let her in. RP 96-97. The
8 mother spoke to her daughter, called her husband, and then called 911. RP 97. The
9 prosecutor then tried to admit A.W.'s and T.M.'s statements on a recording of the 911 call
10 under the excited utterance exception; out of the presence of the jury and after listening to
11 the recording, the trial court ruled that the recording could not come in as the mother's
12 statements to the dispatcher were not excited utterances and that at some point during the
13 tape, A.W.'s statements ceased to be excited utterances as she had calmed down
14 sufficiently. RP 114. In making this ruling, the Court did state: "There may be something
15 that is [an excited utterance] --I'm almost thinking the stuff that you hear in the background
16 before [A.W.] is on the phone where you can actually hear her say a couple of things
17 sounds more hysterical to me and certainly more of an excited utterance than what actually
18 happens when she gets on the phone. The vast majority of this tape is probably not
19 admissible." RP 114; *see also* RP 116-17. These comments make it clear that the court
20 did find that the victim's state of mind would bring her initial statements to her mother that
21 morning under the excited utterance exception to the hearsay rule. After the jury returned,
22 the prosecutor focused T.M. on the events at her house that morning and the point where
23 she was trying to get her daughter calmed down so she could find out what happened. RP
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1 118, 120. T.M. then began to relay statements her daughter made to her about what had
2 happened. RP 119-24. While defense counsel made several objections, RP 119, 120, 124,
3 only two were on hearsay grounds, RP 121, 124, and these objections occurred in the
4 middle and at the end of the T.M.'s testimony regarding A.W.'s statements. RP 118-125.
5 The court's ruling on these two objections, again make it clear that the court was permitting
6 the witness to relay only the content of statements that A.W. had made, which is consistent
7 with a determination that the statements were admissible as excited utterances. RP 121,
8 124. While defense counsel's subsequent cross-examination raised some question as to
9 whether all of T.M.'s testimony was based upon statements A.W. made while she under
10 the influence of a startling event, this portion of the record clearly shows that defense
11 counsel was operating under the understanding that the now-challenged testimony had
12 been admitted under the excited utterance exception. RP 158-160. Despite the answers
13 adduced on cross-examination, defense counsel did not seek any reconsideration of the
14 court's earlier rulings or move to strike any of T.M.'s testimony although he clearly knew
15 how to make such a motion. RP 158-166.

17 To succeed on his claim, petitioner needs to show that the all of the challenged
18 evidence was admitted over his timely hearsay objection and that it was improperly
19 admitted hearsay evidence. Petitioner fails to address the fact that only two responses by
20 T.M. were objected to on the grounds of hearsay - thereby preserving only those responses
21 for review - and wholly fails to address why these two responses did not qualify as excited
22 utterances. Moreover, petitioner has failed to submit necessary evidence to show any
23 abuse of discretion. The court listened to the tape of the 911 call to assess whether the
24 victim was making statements under the influence of a startling event and it clearly
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1 influenced the court's decision. RP 114, 116-17. Yet petitioner did not provide a copy of
2 this tape to the court to support his claim that the court abused its discretion. He has failed
3 to provide the necessary record to support his claim and it should be dismissed. *Williams*,
4 111 Wn.2d at 364.

5 It is petitioner's burden to show that the trial court abused its discretion in admitting
6 A.W.'s statements to her mother as excited utterances and he has made no argument in this
7 regard. Instead, petitioner argues that the victim's statements to her mother were not
8 properly admitted as "prior consistent statements" under ER 801(d)(1)(ii). It is unknown
9 why petitioner chose this hearsay exception for his "straw man" argument as to why the
10 evidence was erroneously admitted. Petitioner cannot succeed by showing the statements
11 were inadmissible under an inapplicable and irrelevant exception - he must address the
12 relevant exception; if he is uncertain as to which exception the court was relying upon,
13 then he has to show that there is *no* relevant exception to support the court's ruling as it is
14 his burden to show an error occurred. Picking an obviously inapplicable exception is
15 insufficient. This claim should be dismissed.

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18 b. Petitioner has not shown the trial court abused its discretion
19 in admitting the victim's statements to a treating nurse as
20 ones made for the purpose of medical diagnosis or treatment
21 under ER 803(a)(4).

22 Under ER 803(a)(4)², a statement made for the purpose of medical diagnosis or
23 treatment is admissible as an exception to the hearsay rule. Courts have found that such
24 statements are generally nontestimonial. *State v. O'Cain*, 169 Wn.2d 228, 279 P.3d 926

25 ² Which provides that "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment" are not excluded by the hearsay rule.

1 (2012); *Michigan v. Bryant*, — U.S. — 131 S. Ct. 1143, 1157 n. 9, 179 L. Ed. 2d 93
2 (2011).

3 Cheryl Killen testified that she is a register nurse who has taken specialized training
4 to become a "sexual assault nurse examiner" ("SANE") and is currently employed in that
5 capacity working at Tacoma General Hospital and Multicare facilities. RP 365-67. Ms.
6 Killen explained that the procedures used at the hospital with a rape victim is to make sure
7 that a patient gets treatment for any injuries and that process includes an examination by
8 both a doctor and a nurse; the nurse obtains a "history of what happened, what the patient
9 says happened that night or day, so that not only can we document that, but also can check
10 for injuries that the patient might have." RP 367-68. Additionally, the nurse is trained to
11 collect evidence that might be on the patient's body. RP 368. Ms. Killen gave such an
12 examination to the victim on December 19-20th, 2008. RP 371. As part of that
13 examination, Ms. Killen asked the victim about what had happened; when the prosecutor
14 started to adduce what A.W. told Ms Killen, defendant raised a hearsay objection. RP 373.
15 The prosecutor responded that she was adducing the information as statements for
16 purposes of medical diagnosis. RP 374. After argument outside the presence of the jury
17 and assurances from the prosecutor that the witness would not be testifying to statements
18 that identified the petitioner as the perpetrator, the court found the statements obtained
19 during this examination were admissible under the medical treatment exception. RP 374-
20 383. The court also rejected defense counsel's argument that the evidence should be
21 excluded as being cumulative of testimony by the victim's mother and the victim herself.
22 RP 383-384. The prosecutor then adduced the victim's answers to Ms. Killen's specific
23 questions as to what had happened - such as whether there was any penetration to the
24
25

1 rectum and whether a condom had been used- as well as what the victim's narrative
2 description of what had happened to her. RP 384-395.

3 The only case petitioner cites in support of his argument that this evidence did not
4 fall under the hearsay exceptions for purposes of medical treatment is *State v. Williams*,
5 137 Wn. App. 736, 154 P.3d 322 (2007). A review of that case -which has remarkably
6 similar facts- is supportive of the trial court's ruling rather than calling it into doubt.

7 In *Williams*, the victim of a kidnap and rape, JAD, was taken to Tacoma General
8 Hospital for examination:
9

10 During JAD's medical examination at Tacoma General Hospital, Teri
11 Jacobsen, a forensic nurse, collected vaginal and anal swabs for DNA
12 testing. ... Jacobsen interviewed JAD using a history questionnaire that
13 included a series of questions about the rape. Jacobsen also took verbatim
notes during JAD's general narrative about what had transpired. At trial,
Jacobsen testified about JAD's answers to the questions on the history
questionnaire and read her notes on JAD's general narrative.

14 *Williams*, 137 Wn. App. at 740-41. On appeal, Williams challenged admission of these
15 statements under ER 803(a)(4) arguing that JAD did not go to the hospital seeking medical
16 treatment but for the collection of evidence. This argument was based upon the cross-
17 examination of JAD when she responded that she went to the hospital so evidence could be
18 gathered and that "at first" she didn't think she needed medical treatment. *Id.* at 746-47.

19 The reviewing court, noting that JAD had testified that she was mostly "in shock" when
20 taken to the hospital, found that her statement that she didn't feel like she had needed
21 treatment "at first" did not demonstrate that her motives for going to the hospital were
22 purely forensic. Moreover, as the examining nurse had testified that she gave JAD
23 information about sexually transmitted diseases and pregnancy based upon the history she
24 had obtained from JAD, this had shown a diagnostic purpose to the questions. The court
25

1 concluded that the information obtained was "reasonably pertinent to medical diagnosis
2 and treatment." *Id.* at 747.

3 Under *Williams*, the ruling below admitting A.W.'s statements under the medical
4 diagnosis and treatment exception to the hearsay rule was well within the trial court's
5 discretion. Petitioner has not pointed to any statements or testimony from A.W. that would
6 indicate she was not seeking medical treatment when she went to the hospital so as to bring
7 the facts of his case close to the facts presented in *Williams*. That case holds that the
8 answers to specific questions put to a rape victim during a medical exam as well as a
9 general narrative of what occurred given by the patient during the exam can be admitted
10 under ER 803(a)(4). Here, Ms. Killen testified that she uses the information obtained from
11 patients during these exams to diagnose where injuries might be. This shows the
12 statements were properly admitted under ER 803(a)(4).

14 Petitioner has failed to present any argument to show the trial court's rulings as to
15 Ms. Killen's testimony constitute an abuse of discretion. Petitioner has not met his burden
16 of showing error in this ruling and it should be dismissed.

17
18 c. As the challenged evidence was cumulative of properly
19 admitted evidence, petitioner cannot show that he was
20 prejudiced by the admission of the evidence or that his trial
21 was unfair.

22 An irregularity, such as the erroneous admission of evidence, in trial proceedings is
23 grounds for reversal only when it is so prejudicial that it deprives the defendant of a fair
24 trial. See *State v. Post*, 59 Wn. App. 389, 395, 797 P.2d 1160 (1990), *affirmed*, 118 Wn.2d
25 596, 826 P.2d 172, 837 P.2d 599 (1992). To determine the effect of an improper statement
or improperly admitted evidence, a court must determine whether the remark or evidence,

1 when viewed against the backdrop of all the evidence, so tainted the entire proceeding that
2 the accused did not have a fair trial. *State v. Weber*, 99 Wn.2d 158, 163-164, 659 P.2d
3 1102 (1983). There is little prejudicial effect if the evidence is cumulative of properly
4 admitted evidence. *Id.* at 166, *see also Brown v. Spokane County Fire Prot. Dist. No. 1*,
5 100 Wn.2d 188, 198, 668 P.2d 571 (1983) (juror's improper visit to the accident scene did
6 not require reversal where the juror's personal observations were cumulative of numerous
7 photographic exhibits properly admitted into evidence); *State v. Lemieux*, 75 Wn.2d 89,
8 90-91, 448 P.2d 943 (1968) (witness's improper ex parte comments to the jury that he was
9 the one who gave the police key evidence did not require a new trial because it was
10 cumulative of his testimony).

12 As argued above, petitioner has failed to show that the challenged evidence was
13 improperly admitted, but even if he were to make this showing, he would still have to
14 show that he was actually prejudiced by the admission of the evidence before he would be
15 entitled to any relief. As the information that came out via the challenged evidence, RP
16 121-122, 392-395, was also adduced during the testimony of the victim, RP 181-197, the
17 information presented in the challenged evidence was cumulative of evidence that was
18 unquestionably admissible. Petitioner fails to show that the suffered any prejudice from
19 the introduction of evidence that was cumulative of properly admitted evidence, much less
20 that it was so prejudicial as to render his trial unfair. Assuming he could make a showing
21 of error, he has failed to show that it had a harmful effect that would entitle him to any
22 relief.

1 4. PETITIONER FAILS TO SHOW THAT HIS APPELLATE
2 COUNSEL FAILED TO RAISE ANY MERITORIOUS ISSUE ON
3 DIRECT APPEAL SO AS TO SUCCEED ON HIS
 INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL
 CLAIM.

4 In order to prevail on a claim of ineffective assistance of appellate counsel, a
5 petitioner must demonstrate the merit of any legal issue appellate counsel raised
6 inadequately or failed to raise and also show []he was prejudiced.” *In re Personal*
7 *Restraint of Netherton*, 177 Wn.2d 798, 801, 306 P.3d 918 (2013) (citing *In re Personal*
8 *Restraint of Lord*, 123 Wn.2d 296, 314, 868 P.2d 835, *cert. denied*, 513 U.S. 849, 115 S.
9 Ct. 146, 130 L. Ed. 2d 86 (1994)).
10

11 As argued above most of petitioner's claims of alleged prosecutorial misconduct in
12 closing argument were not preserved for review in the trial court. Petitioner fails to show
13 that any of these claims could meet the higher standard for obtaining relief as any prejudice
14 they created could have easily been eliminated by a curative instruction. It is not
15 surprising that appellate counsel did not assert the unobjected to comments constituted
16 error on direct appeal. Petitioner has also failed to show that the arguments that were
17 objected to at trial were improper or that they had any negative impact on the jury's verdict.
18 He cannot show that he was reasonably likely to have prevailed if this argument had been
19 raised on direct review.
20

21 Similarly, as argued above, petitioner has failed to show the trial court abused its
22 discretion in admitting certain out of court statements under the excited utterance and
23 medical diagnosis and treatment exceptions to the hearsay rule. As he has not shown the
24 merit of his claims, he cannot show that his appellate counsel was deficient for not raising
25 them on direct review.

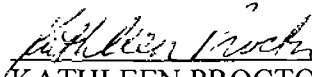
1 Should the court disagree with any of the above procedural arguments, the State
2 reserves the right to respond on the merits.

3
4 D. CONCLUSION.

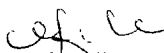
5 For the foregoing reasons, the State asks the Court to dismiss the petition.

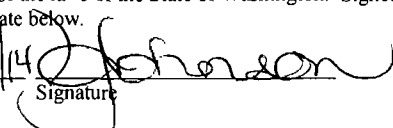
6 DATED: January 27, 2014.

7 MARK E. LINDQUIST
8 Pierce County
9 Prosecuting Attorney

10 
KATHLEEN PROCTOR
11 Deputy Prosecuting Attorney
WSB #14811

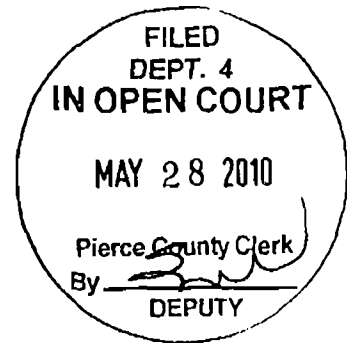
12
13 Certificate of Service:

14 The undersigned certifies that on this day she delivered by  U.S. mail or
ABC-LMI delivery to the attorney of record for the appellant and appellant
15 c/o his attorney or to the attorney for respondent and respondent c/o his or
her attorney true and correct copies of the document to which this certificate
is attached. This statement is certified to be true and correct under penalty of
perjury of the laws of the State of Washington. Signed at Tacoma, Washington,
on the date below.

16 
Date Signature

APPENDIX “A”

Judgment and Sentence



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO: 08-1-06144-4

vs.

SHAMARR DERRICK PARKER,

Defendant.

WARRANT OF COMMITMENT

- 1) ☐ County Jail
 2) ☒ Dept. of Corrections
 3) ☐ Other Custody

THE STATE OF WASHINGTON TO THE DIRECTOR OF ADULT DETENTION OF PIERCE COUNTY:

WHEREAS, Judgment has been pronounced against the defendant in the Superior Court of the State of Washington for the County of Pierce, that the defendant be punished as specified in the Judgment and Sentence/Order Modifying/Revoking Probation/Community Supervision, a full and correct copy of which is attached hereto.

[] 1. YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement in Pierce County Jail).

[] 2. YOU, THE DIRECTOR, ARE COMMANDED to take and deliver the defendant to the proper officers of the Department of Corrections, and

YOU, THE PROPER OFFICERS OF THE DEPARTMENT OF CORRECTIONS, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement in Department of Corrections custody).

WARRANT OF
COMMITMENT -1

Office of Prosecuting Attorney
930 Tacoma Avenue S. Room 946
Tacoma, Washington 98402-2171
Telephone: (253) 798-7400

08-1-06144-4

[] 3. YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for
classification, confinement and placement as ordered in the Judgment and Sentence.
(Sentence of confinement or placement not covered by Sections 1 and 2 above).

Dated: 5/28/10

By direction of the Honorable

[Signature]
JUDGE

CLERK

By: _____

DEPUTY CLERK

CERTIFIED COPY DELIVERED TO SHERIFF

Date _____ By _____ Deputy

STATE OF WASHINGTON

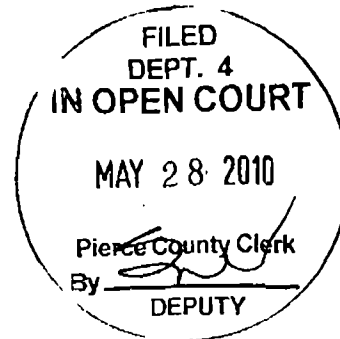
County of Pierce

I, Kevin Stock, Clerk of the above entitled
Court, do hereby certify that this foregoing
instrument is a true and correct copy of the
original now on file in my office.
IN WITNESS WHEREOF, I hereunto set my
hand and the Seal of Said Court this
_____ day of _____,

KEVIN STOCK, Clerk

By: _____ Deputy

tmc



08-1-06144-4

FILED
DEPT. 4
IN OPEN COURT

MAY 28 2010

Pierce County Clerk
By [Signature]
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 08-1-06144-4

vs.

SHAMARR DERRICK PARKER

Defendant.

JUDGMENT AND SENTENCE (FJS)

☒ Prison ☐ RCW 9.94A.712 Prison Confinement☐ Jail One Year or Less☐ First-Time Offender☐ Special Sexual Offender Sentencing Alternative☐ Special Drug Offender Sentencing Alternative☐ Breaking The Cycle (BTC)☐ Clerk's Action Required, para 4.5

(SDOSA), 4.7 and 4.8 (SSOSA) 4.15.2, 5.3, 5.6 and 5.8

SID: WA16225014

DOB: 07/21/1975

I. HEARING

- 1.1 A sentencing hearing was held and the defendant, the defendant's lawyer and the (deputy) prosecuting attorney were present.

II. FINDINGS

There being no reason why judgment should not be pronounced, the court FINDS:

- 2.1 CURRENT OFFENSE(S): The defendant was found guilty on April 22, 2010 by ☐ plea ☒ jury-verdict ☐ bench trial of:

COUNT	CRIME	RCW	ENHANCEMENT TYPE*	DATE OF CRIME	INCIDENT NO.
I	KIDNAPPING IN THE FIRST DEGREE (F2)	9A.40.020(1)(b) 9.94A.030 9.94A.125 9.94A.030 9.94A.602 9.94A.310 9.94A.510 9.94A.370 9.94A.530	(D) (SM)	12/19/08	TPD 083541060

10-9-06394-4

08-1-06144-4

III	ROBBERY IN THE FIRST DEGREE, AAA1	9A.56.190 9A.56.200 (1)(a)(i) 9.94A.125 9.94A.602 9.94A.310 9.94A.510 9.94A.370 9.94A.533	DWSE 24 MONTHS	12/19/08	TPD 083541060
-----	--------------------------------------	---	-------------------	----------	---------------

* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Hom, See RCW 46.61.520, (JP) Juvenile present, (SM) Sexual Motivation, (SCF) Sexual Conduct with a Child for a Fee. See RCW 9.94A.533(8). (If the crime is a drug offense, include the type of drug in the second column.)

as charged in the SECOND AMENDED Information

☒ [X] A special verdict/finding for use of deadly weapon other than a firearm was returned on Count(s) I. RCW 9.94A.602, 9.94A.533.

☒ [X] Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.589): Count I & Count III

☐ [] Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

2.2 CRIMINAL HISTORY (RCW 9.94A.525):

	CRIME	DATE OF SENTENCE	SENTENCING COURT (County & State)	DATE OF CRIME	A or J ADULT JUV	TYPE OF CRIME
1	ASSAULT 2	07/22/96	Pierce Co., WA	06/05/94	A	NV
2	ASSAULT 2	07/22/96	Pierce Co., WA	06/05/94	A	NV
3	ASSAULT 2	07/22/96	Pierce Co., WA	06/05/94	A	NV
4	UPOF	04/07/00	Pierce Co., WA	12/23/99	A	NV
5	UPFA 1	09/26/03	Pierce Co., WA	04/09/03	A	NV
6	CONSP TO POSS CON SUB W/ INT DEL	02/05/08	Pierce Co., WA	08/07/07	A	NV
7	CONSP TO POSS CON SUB	02/05/08	Pierce Co., WA	08/16/07	A	NV
8	NVOL		Tacoma Muni., WA	07/10/92	A	NV
9	NVOL		Tacoma Muni., WA	01/23/93	A	NV
10	FAIL TO COMPLY		Tacoma Muni., WA	01/23/93	A	NV
11	NVOL		Tacoma Muni., WA	03/09/93	A	NV
12	NVOL		Pierce Co Dist Ct, WA	10/05/93	A	NV
13	INT W/ POLICE OFFICER		Pierce Co Dist Ct, WA	10/05/93	A	NV
14	CRIM TRESPASS 2		Lakewood Muni., WA	04/07/00	A	NV

☐ [] The court finds that the following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.525):

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2.3 SENTENCING DATA:

COUNT NO.	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE (not including enhancements)	PLUS ENHANCEMENTS	TOTAL STANDARD RANGE (including enhancement)	MAXIMUM TERM
I	10	XII	149-198 MONTHS	24 MONTHS	173-222 MONTHS	LIFE/ \$50,000
III	10	IX	129-171 MONTHS	24 MONTHS	153-195 MONTHS	LIFE/ \$50,000

2.4 ☐ EXCEPTIONAL SENTENCE. Substantial and compelling reasons exist which justify an exceptional sentence:

☐ within ☐ below the standard range for Count(s) _____.

☐ above the standard range for Count(s) _____.

☐ The defendant and state stipulate that justice is best served by imposition of the exceptional sentence above the standard range and the court finds the exceptional sentence furthers and is consistent with the interests of justice and the purposes of the sentencing reform act.

☐ Aggravating factors were ☐ stipulated by the defendant, ☐ found by the court after the defendant waived jury trial, ☐ found by jury by special interrogatory.

Findings of fact and conclusions of law are attached in Appendix 2.4. ☐ Jury's special interrogatory is attached. The Prosecuting Attorney ☐ did ☐ did not recommend a similar sentence.

2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. The court has considered the total amount owing, the defend's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

☐ The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753):

☐ The following extraordinary circumstances exist that make payment of nonmandatory legal financial obligations inappropriate:

2.6 For violent offenses, most serious offenses, or armed offenders recommended sentencing agreements or plea agreements are ☐ attached ☐ as follows:

III. JUDGMENT

3.1 The defendant is GUILTY of the Counts and Charges listed in Paragraph 2.1.

3.2 ☐ The court DISMISSES Counts _____ ☐ The defendant is found NOT GUILTY of Counts _____

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IV. SENTENCE AND ORDER

IT IS ORDERED:

4.1 Defendant shall pay to the Clerk of this Court: (Pierce County Clerk, 930 Tacoma Ave #110, Tacoma WA 98402)

JASS CODE

1041.40

RTN/RJN

\$ 1041.40

Restitution to: _____

\$

Restitution to: _____

(Name and Address--address may be withheld and provided confidentially to Clerk's Office).

PCV

\$ 500.00

Crime Victim assessment

DNA

\$ 100.00

DNA Database Fee

PUB

\$ 1000.00

Court-Appointed Attorney Fees and Defense Costs

FRC

\$ 200.00

Criminal Filing Fee

FCM

\$ _____

Fine

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OTHER LEGAL FINANCIAL OBLIGATIONS (specify below)

\$ _____ Other Costs for: _____

\$ _____ Other Costs for: _____

\$ 2841.00 TOTAL

☒ The above total does not include all restitution which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:

☒ shall be set by the prosecutor.

☐ is scheduled for _____

☐ **RESTITUTION.** Order Attached

☒ Restitution ordered above shall be paid jointly and severally with:

NAME of other defendant	CAUSE NUMBER	(Victim name)	(Amount-\$)
RJN			

☐ The Department of Corrections (DOC) or clerk of the court shall immediately issue a Notice of Payroll Deduction. RCW 9.94A.7602, RCW 9.94A.760(8).

☒ All payments shall be made in accordance with the policies of the clerk, commencing immediately, unless the court specifically sets forth the rate herein: Not less than \$ Per CCO per month commencing Per CCO. RCW 9.94.760. If the court does not set the rate herein, the defendant shall report to the clerk's office within 24 hours of the entry of the judgment and sentence to set up a payment plan.

The defendant shall report to the clerk of the court or as directed by the clerk of the court to provide financial and other information as requested. RCW 9.94A.760(7)(b)

☐ **COSTS OF INCARCERATION.** In addition to other costs imposed herein, the court finds that the defendant has or is likely to have the means to pay the costs of incarceration, and the defendant is ordered to pay such costs at the statutory rate. RCW 10.01.160.

COLLECTION COSTS The defendant shall pay the costs of services to collect unpaid legal financial obligations per contract or statute. RCW 36.18.190, 9.94A.780 and 19.16.500.

INTEREST The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090

COSTS ON APPEAL An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW. 10.73.160.

4.1b **ELECTRONIC MONITORING REIMBURSEMENT.** The defendant is ordered to reimburse _____ (name of electronic monitoring agency) at _____ for the cost of pretrial electronic monitoring in the amount of \$ _____.

4.2 ☒ **DNA TESTING.** The defendant shall have a blood/biological sample drawn for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency, the county or DOC, shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754.

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[] HIV TESTING. The Health Department or designee shall test and counsel the defendant for HIV as soon as possible and the defendant shall fully cooperate in the testing. RCW 70.24.340.

4.3 NO CONTACT

The defendant shall not have contact with A.L.A. 9/19/91 (name, DOB) including, but not limited to, personal, verbal, telephonic, written or contact through a third party for Life years (not to exceed the maximum statutory sentence).

[X] Domestic Violence No-Contact Order, Antiharassment No-Contact Order, or Sexual Assault Protection Order is filed with this Judgment and Sentence.

4.4 OTHER: Property may have been taken into custody in conjunction with this case. Property may be returned to the rightful owner. Any claim for return of such property must be made within 90 days. After 90 days, if you do not make a claim, property may be disposed of according to law.

<u>Abide by formal NCO</u>
<u>Law abiding behavior</u>
<u>Serve financial obligations, including any restitution - if any</u>
<u>Follow all conditions of Community Corrections Officer</u>
<u>Register as kidnapping offender per statute</u>

4.4a BOND IS HEREBY EXONERATED

4.5 CONFINEMENT OVER ONE YEAR. The defendant is sentenced as follows:

(a) CONFINEMENT. RCW 9.94A.589. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections (DOC):

<u>192</u> months on Count	<u>1</u> months on Count	
<u>171</u> months on Count	<u>3</u> months on Count	
months on Count	months on Count	

A special finding/verdict having been entered as indicated in Section 2.1, the defendant is sentenced to the following additional term of total confinement in the custody of the Department of Corrections:

<u>24</u> months on Count No	<u>1</u> months on Count No	
<u>24</u> months on Count No	<u>3</u> months on Count No	
months on Count No	months on Count No	

Sentence enhancements in Counts shall run

[] concurrent [X] consecutive to each other.

Sentence enhancements in Counts shall be served

[X] flat time [] subject to earned good time credit

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Actual number of months of total confinement ordered is: 240 months

(Add mandatory firearm, deadly weapons, and sexual motivation enhancement time to run consecutively to other counts, see Section 2.3, Sentencing Data, above).

[] The confinement time on Count(s) _____ contain(s) a mandatory minimum term of _____.

CONSECUTIVE/CONCURRENT SENTENCES. RCW 9.94A.589. All counts shall be served concurrently, except for the portion of those counts for which there is a special finding of a firearm, other deadly weapon, sexual motivation, VUCSA in a protected zone, or manufacture of methamphetamine with juvenile present as set forth above at Section 2.3, and except for the following counts which shall be served consecutively: _____

The sentence herein shall run consecutively to all felony sentences in other cause numbers imposed prior to the commission of the crime(s) being sentenced. The sentence herein shall run concurrently with felony sentences in other cause numbers imposed after the commission of the crime(s) being sentenced except for the following cause numbers. RCW 9.94A.589: _____

Confinement shall commence immediately unless otherwise set forth here: _____

(c) The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.505. The time served shall be computed by the jail unless the credit for time served prior to sentencing is specifically set forth by the court: 504 days

4.6 [] **COMMUNITY PLACEMENT** (pre 7/1/00 offenses) is ordered as follows:

Count _____ for _____ months,

Count _____ for _____ months,

Count _____ for _____ months,

[X] **COMMUNITY CUSTODY** is ordered as follows:

Count 1 for a range from: 36 months to _____ Months,

Count 3 for a range from: 18 months to _____ Months,

Count _____ for a range from: _____ to _____ Months,

or for the period of earned release awarded pursuant to RCW 9.94A.728(1) and (2), whichever is longer, and standard mandatory conditions are ordered. [See RCW 9.94A.700 and .705 for community placement offenses which include serious violent offenses, second degree assault, any crime against a person with a deadly weapon finding and chapter 69.50 or 69.52 RCW offense not sentenced under RCW 9.94A.660 committed before July 1, 2000. See RCW 9.94A.715 for community custody range offenses, which include sex offenses not sentenced under RCW 9.94A.712 and violent offenses committed on or after July 1, 2000. Community custody follows a term for a sex offense -- RCW 9.94A. Use paragraph 4.7 to impose community custody following work ethic camp.]

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On or after July 1, 2003, DOC shall supervise the defendant if DOC classifies the defendant in the A or B risk categories, or, DOC classifies the defendant in the C or D risk categories and at least one of the following apply:

a) the defendant committed a current or prior:		
i) Sex offense	ii) Violent offense	iii) Crime against a person (RCW 9.94A.411)
iv) Domestic violence offense (RCW 10.99.020)		v) Residential burglary offense
vi) Offense for manufacture, delivery or possession with intent to deliver methamphetamine including its salts, isomers, and salts of isomers,		
vii) Offense for delivery of a controlled substance to a minor, or attempt, solicitation or conspiracy (vi, vii)		
b) the conditions of community placement or community custody include chemical dependency treatment.		
c) the defendant is subject to supervision under the interstate compact agreement, RCW 9.94A.745.		

While on community placement or community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community restitution (service); (3) notify DOC of any change in defendant's address or employment; (4) not consume controlled substances except pursuant to lawfully issued prescriptions; (5) not unlawfully possess controlled substances while in community custody; (6) pay supervision fees as determined by DOC; (7) perform affirmative acts necessary to monitor compliance with the orders of the court as required by DOC, and (8) for sex offenses, submit to electronic monitoring if imposed by DOC. The residence location and living arrangements are subject to the prior approval of DOC while in community placement or community custody. Community custody for sex offenders not sentenced under RCW 9.94A.712 may be extended for up to the statutory maximum term of the sentence. Violation of community custody imposed for a sex offense may result in additional confinement.

☐ The defendant shall not consume any alcohol.

☒ Defendant shall have no contact with: Joe Frankel NCO

☐ Defendant shall remain ☐ within ☐ outside of a specified geographical boundary, to wit: _____

☐ Defendant shall not reside in a community protection zone (within 880 feet of the facilities or grounds of a public or private school). (RCW 9.94A.030(8))

☒ The defendant shall participate in the following crime-related treatment or counseling services: Per SCCO

☐ The defendant shall undergo an evaluation for treatment for ☐ domestic violence ☐ substance abuse

☐ mental health ☐ anger management and fully comply with all recommended treatment.

☒ The defendant shall comply with the following crime-related prohibitions: Per SCCO

Other conditions may be imposed by the court or DOC during community custody, or are set forth here:

Per SCCO

☐ For sentences imposed under RCW 9.94A.712, other conditions, including electronic monitoring, may be imposed during community custody by the Indeterminate Sentence Review Board, or in an emergency by DOC. Emergency conditions imposed by DOC shall not remain in effect longer than seven working days.

PROVIDED: That under no circumstances shall the total term of confinement plus the term of community custody actually served exceed the statutory maximum for each offense

08-1-06144-4

4.7 ☐ **WORK ETHIC CAMP.** RCW 9.94A.690, RCW 72.09.410. The court finds that the defendant is eligible and is likely to qualify for work ethic camp and the court recommends that the defendant serve the sentence at a work ethic camp. Upon completion of work ethic camp, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions below. Violation of the conditions of community custody may result in a return to total confinement for the balance of the defendant's remaining time of total confinement. The conditions of community custody are stated above in Section 4.6.

4.8 **OFF LIMITS ORDER** (known drug trafficker) RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the County Jail or Department of Corrections: _____

V. NOTICES AND SIGNATURES

5.1 **COLLATERAL ATTACK ON JUDGMENT.** Any petition or motion for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, must be filed within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.

5.2 **LENGTH OF SUPERVISION.** For an offense committed prior to July 1, 2000, the defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender, for the purpose of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505. The clerk of the court is authorized to collect unpaid legal financial obligations at any time the offender remains under the jurisdiction of the court for purposes of his or her legal financial obligations. RCW 9.94A.760(4) and RCW 9.94A.753(4).

5.3 **NOTICE OF INCOME-WITHHOLDING ACTION.** If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections or the clerk of the court may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A may be taken without further notice. RCW 9.94A.760 may be taken without further notice. RCW 9.94A.7606.

5.4 **RESTITUTION HEARING.**

☐ Defendant waives any right to be present at any restitution hearing (sign initials): _____

08-1-06144-4

5.5 **CRIMINAL ENFORCEMENT AND CIVIL COLLECTION.** Any violation of this Judgment and Sentence is punishable by up to 60 days of confinement per violation. Per section 2.5 of this document, legal financial obligations are collectible by civil means. RCW 9.94A.634.

5.6 **FIREARMS.** You must immediately surrender any concealed pistol license and you may not own, use or possess any firearm unless your right to do so is restored by a court of record. (The court clerk shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment.) RCW 9.41.040, 9.41.047.

5.7 **SEX AND KIDNAPPING OFFENDER REGISTRATION.** RCW 9A.44.130, 10.01.200.

1. **General Applicability and Requirements:** Because this crime involves a sex offense or kidnapping offense (e.g., kidnapping in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in chapter 9A.40 RCW) where the victim is a minor defined in RCW 9A.44.130, you are required to register with the sheriff of the county of the state of Washington where you reside. If you are not a resident of Washington but you are a student in Washington or you are employed in Washington or you carry on a vocation in Washington, you must register with the sheriff of the county of your school, place of employment, or vocation. You must register immediately upon being sentenced unless you are in custody, in which case you must register within 24 hours of your release.

2. **Offenders Who Leave the State and Return:** If you leave the state following your sentencing or release from custody but later move back to Washington, you must register within three (3) business days after moving to this state or within 24 hours after doing so if you are under the jurisdiction of this state's Department of Corrections. If you leave this state following your sentencing or release from custody but later while not a resident of Washington you become employed in Washington, carry out a vocation in Washington, or attend school in Washington, you must register within three (3) business days after starting school in this state or becoming employed or carrying out a vocation in this state, or within 24 hours after doing so if you are under the jurisdiction of this state's Department of Corrections.

3. **Change of Residence Within State and Leaving the State:** If you change your residence within a county, you must send written notice of your change of residence to the sheriff within 72 hours of moving. If you change your residence to a new county within this state, you must send signed written notice of your change of residence to the sheriff of your new county of residence at least 14 days before moving and register with that sheriff within 24 hours of moving. You must also give signed written notice of your change of address to the sheriff of the county where last registered within 10 days of moving. If you move out of Washington State, you must send written notice within 10 days of moving to the county sheriff with whom you last registered in Washington State.

4. **Additional Requirements Upon Moving to Another State:** If you move to another state, or if you work, carry on a vocation, or attend school in another state you must register a new address, fingerprints, and photograph with the new state within 10 days after establishing residence, or after beginning to work, carry on a vocation, or attend school in the new state. You must also send written notice within 10 days of moving to the new state or to a foreign country to the county sheriff with whom you last registered in Washington State.

5. **Notification Requirement When Enrolling in or Employed by a Public or Private Institution of Higher Education or Common School (K-12):** If you are a resident of Washington and you are admitted to a public or private institution of higher education, you are required to notify the sheriff of the county of your residence of your intent to attend the institution within 10 days of enrolling or by the first business day after arriving at the institution, whichever is earlier. If you become employed at a public or private institution of higher education, you are required to notify the sheriff for the county of your residence of your employment by the institution within 10 days of accepting employment or by the first business day after beginning to work at the institution, whichever is earlier. If your enrollment or employment at a public or private institution of higher education is terminated, you are required to notify the sheriff for the county of your residence of your termination of enrollment or employment within 10 days of such termination. If you attend, or plan to attend, a public or private school regulated under Title 28A RCW or chapter 72.40 RCW, you are required to notify the sheriff of the county of your residence of your intent to attend the school. You must notify the sheriff within 10 days of enrolling or 10 days prior to arriving at the school to attend classes, whichever is earlier. The sheriff shall promptly notify the principal of the school.

08-1-06144-4

6. **Registration by a Person Who Does Not Have a Fixed Residence:** Even if you do not have a fixed residence, you are required to register. Registration must occur within 24 hours of release in the county where you are being supervised if you do not have a residence at the time of your release from custody. Within 48 hours excluding weekends and holidays after losing your fixed residence, you must send signed written notice to the sheriff of the county where you last registered. If you enter a different county and stay there for more than 24 hours, you will be required to register in the new county. You must also report weekly in person to the sheriff of the county where you are registered. The weekly report shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. You may be required to provide a list the locations where you have stayed during the last seven days. The lack of a fixed residence is a factor that may be considered in determining an offender's risk level and shall make the offender subject to disclosure of information to the public at large pursuant to RCW 4.24.550.

7. **Reporting Requirements for Persons Who Are Risk Level II or III:** If you have a fixed residence and you are designated as a risk level II or III, you must report, in person, every 90 days to the sheriff of the county where you are registered. Reporting shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. If you comply with the 90-day reporting requirement with no violations for at least five years in the community, you may petition the superior court to be relieved of the duty to report every 90 days.

8. **Application for a Name Change:** If you apply for a name change, you must submit a copy of the application to the county sheriff of the county of your residence and to the state patrol not fewer than five days before the entry of an order granting the name change. If you receive an order changing your name, you must submit a copy of the order to the county sheriff of the county of your residence and to the state patrol within five days of the entry of the order. RCW 9A.44.130(7).

5.8 [] The court finds that Court _____ is a felony in the commission of which a motor vehicle was used. The clerk of the court is directed to immediately forward an Abstract of Court Record to the Department of Licensing, which must revoke the defendant's driver's license. RCW 46.20.285.

5.9 If the defendant is or becomes subject to court-ordered mental health or chemical dependency treatment, the defendant must notify DOC and the defendant's treatment information must be shared with DOC for the duration of the defendant's incarceration and supervision. RCW 9.94A.562.

5.10 OTHER: _____

FILED
DEPT. 4
IN OPEN COURT

DONE in Open Court and in the presence of the defendant this date: 5/28/10

Pierce County Clerk
By _____
DEPUTY

JUDGE
Print name

BRYAN CHUSHCOFF

Deputy Prosecuting Attorney

Print name: Angelica McEaba

WSB # 34673

Attorney for Defendant

Print name: Leslie Tolson

WSB # 20172

Defendant

Print name: Shamar

08-1-06144-4

VOTING RIGHTS STATEMENT: RCW 10.64.140. I acknowledge that my right to vote has been lost due to felony convictions. If I am registered to vote, my voter registration will be cancelled. My right to vote may be restored by: a) A certificate of discharge issued by the sentencing court, RCW 9.94A.637; b) A court order issued by the sentencing court restoring the right, RCW 9.92.066; c) A final order of discharge issued by the indeterminate sentence review board, RCW 9.96.050, or d) A certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored is a class C felony, RCW 92A.84.660.

Defendant's signature:

Refused to sign

08-1-06144-4

CERTIFICATE OF CLERK

CAUSE NUMBER of this case: 08-1-06144-4

I, KEVIN STOCK Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above-entitled action now on record in this office.

WITNESS my hand and seal of the said Superior Court affixed this date: _____

Clerk of said County and State, by: _____, Deputy Clerk

IDENTIFICATION OF COURT REPORTER

Katrina Smith
Court Reporter

08-1-06144-4

APPENDIX "F"

The defendant having been sentenced to the Department of Corrections for a:

- ☐ sex offense
☒ serious violent offense
☐ assault in the second degree
☒ any crime where the defendant or an accomplice was armed with a deadly weapon
☐ any felony under 69.50 and 69.52

The offender shall report to and be available for contact with the assigned community corrections officer as directed:

The offender shall work at Department of Corrections approved education, employment, and/or community service;

The offender shall not consume controlled substances except pursuant to lawfully issued prescriptions:

An offender in community custody shall not unlawfully possess controlled substances;

The offender shall pay community placement fees as determined by DOC:

The residence location and living arrangements are subject to the prior approval of the department of corrections during the period of community placement.

The offender shall submit to affirmative acts necessary to monitor compliance with court orders as required by DOC.

The Court may also order any of the following special conditions:

_____ (I) The offender shall remain within, or outside of, a specified geographical boundary: _____

☒ (II) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals: see formal NCO & per CCO

_____ (III) The offender shall participate in crime-related treatment or counseling services;

_____ (IV) The offender shall not consume alcohol; _____

_____ (V) The residence location and living arrangements of a sex offender shall be subject to the prior approval of the department of corrections; or

☒ (VI) The offender shall comply with any crime-related prohibitions.

☒ (VII) Other: Any condition per CCO

08-1-06144-4

IDENTIFICATION OF DEFENDANT

SID No. WA16225014
(If no SID take fingerprint card for State Patrol)

Date of Birth 07/21/1973

FBI No. 929388TA3

Local ID No. PCSO158668

PCN No. 539671561

Other

Alias name, SSN, DOB: _____

Race:		Ethnicity:		Sex:	
<input type="checkbox"/>	Asian/Pacific Islander	<input checked="" type="checkbox"/>	Black/African-American	<input type="checkbox"/>	Caucasian
<input type="checkbox"/>	Native American	<input type="checkbox"/>	Other: :	<input checked="" type="checkbox"/>	Non-Hispanic
				<input checked="" type="checkbox"/>	Male
				<input type="checkbox"/>	Female

FINGERPRINTS

Left four fingers taken simultaneously

Left Thumb



Right Thumb

Right four fingers taken simultaneously



I attest that I saw the same defendant who appeared in court on this document affix his or her fingerprints and signature thereto. Clerk of the Court, Deputy Clerk, Susan Wimmer Dated: 5-28-10

DEFENDANT'S SIGNATURE: Refused to sign

DEFENDANT'S ADDRESS: _____

State of Washington, County of Pierce ss: I, Kevin Stock, Clerk of the
aforementioned court do hereby certify that this foregoing instrument is
a true and correct copy of the original now on file in my office.
IN WITNESS WHEREOF, I herunto set my hand and the Seal of said
Court this 27 day of January, 2014



Kevin Stock, Pierce County Clerk

By /S/Melissa Engler, Deputy.

Dated: Jan 27, 2014 9:05 AM



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<https://linxonline.co.pierce.wa.us/linxweb/Case/CaseFiling/certifiedDocumentView.cfm>,
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APPENDIX “B”

Court of Appeals Opinion

17334 2/1/2012 00029

Case Number: 08-1-06144-4 Date: January 27, 2014

SerialID: D4AAEDC6-F20F-6452-D52BFB7E358CB893

Certified By: Kevin Stock Pierce County Clerk, Washington

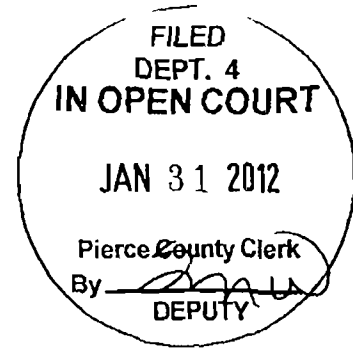


08-1-06144-4

37920965

CPOPN

02-01-12



IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

STATE OF WASHINGTON,

Plaintiff ,

vs

PARKER, SHAMARR DERRICK,

Defendant

Cause No. 08-1-06144-4

UNPUBLISHED OPINION

FILED
 COURT OF APPEALS
 WASHINGTON

12 JAN 31 AM 9:08

STATE OF WASHINGTON

BY [Signature] CLERK

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

SHAMARR DERRICK PARKER,

Appellant.

No. 40793-1-II

UNPUBLISHED OPINION

ARMSTRONG, P.J. – Shamarr Derrick Parker appeals his first degree kidnapping conviction, arguing that the evidence was insufficient to support convictions of both first degree kidnapping and first degree robbery because the victim's restraint during the kidnapping was incidental to the robbery. Finding sufficient evidence to support a separate kidnapping conviction, we affirm.

FACTS

In December 2008, T.M.¹ called 911 to report that her 17-year-old daughter A.W. had been raped at knifepoint. The State eventually charged Parker with first degree kidnapping while armed with a deadly weapon, first degree robbery while armed with a deadly weapon, and first degree rape while armed with a deadly weapon.

A.W. testified that she was waiting for a Tacoma bus to take her home when a brown car drove by. A heavy snow had fallen that day. Parker, the driver of the brown car, asked A.W. if she wanted a ride and pulled into a nearby parking lot. A.W. became nervous and began walking toward a different bus stop. When Parker drove by a second and third time, A.W. decided to cut through an alley.

¹ T.M. is referred to by her initials for the purpose of anonymity.

No. 40793-1-II

When A.W. did so, Parker drove into the alley, got out of his car, and grabbed her by the arm. A.W. testified that he held a knife to her throat and said he would not harm her if she kept quiet and cooperated. He pushed A.W. toward his car, tied her wrists behind her back with plastic bindings, and shoved her into the backseat so that she was lying on her side, facing the driver's seat.

A.W. testified that Parker drove for about a half hour to an open area without nearby buildings. Parker then untied her bindings and told her to remove her jacket. He went through A.W.'s jacket and purse, removing four small bags of marijuana and some cash. He again showed A.W. the knife and told her to cooperate in what was just a robbery. After searching through the rest of her things and inside her underwear for money, Parker forced A.W. to disrobe. She testified that he then engaged in vaginal intercourse while holding a knife to her throat, during which she stared at Mardi Gras beads hanging from the rearview mirror.

Afterward, Parker asked A.W. where she lived so he could drive her home, and she gave him an address several blocks away. As he tried to leave, he got temporarily stuck in the snow. When Parker dropped A.W. off, she wrote his license plate number on her hand and walked home.

Within hours, officers found the license plate on a brown sedan with beads hanging from its rear view mirror. After the car's impoundment, they found a knife under the front passenger seat; an expert testified that Parker's fingerprint was on the knife. Officers also found plastic cords in the driver's side door pocket. A.W. identified Parker from a photo montage but was not sure whether the knife from the car was the one he had used. She denied knowing Parker or meeting him to sell drugs.

No. 40793-1-II

Parker's ex-girlfriend testified that he arrived at her home on the night of the robbery, looking disheveled. He told her he had used a knife to take marijuana from a girl. She denied telling a detective that she deleted A.W.'s first name and number from Parker's phone.

Detective Brad Graham eventually took A.W. to an open lot outside the city limits where officers believed the robbery had occurred. A.W. became upset when they arrived and said, "This is it." 7 Report of Proceedings at 657. The property owner testified that after a large snowstorm in December 2008, he had noticed tire marks in the snow that looked as though a car had been stuck before gaining traction. A.W. also identified the alley in which Parker grabbed her.

Testing of sperm samples gathered from A.W. revealed the source to be her boyfriend but not Parker. A.W. admitted spending the morning and afternoon before the robbery with her boyfriend.

Officers established that the brown sedan belonged to Parker's mother and that Parker sometimes drove it. After Parker's mother testified that she used the knife under the seat to scrape ice from the windshield, Detective Graham testified that Mrs. Parker could not explain the knife's location in her car when he interviewed her.

The defense argued during closing that A.W. made up the rape charge because she was mad at Parker for taking her drugs and because she had violated her curfew and wanted to deflect her mother's anger. During deliberations, the jury informed the court that it could not reach a unanimous verdict on all counts. The jury convicted Parker of first degree kidnapping and first degree robbery and found by special verdict that he was armed with a deadly weapon during the commission of each offense. The jury could not reach a unanimous verdict on the rape charge,

No. 40793-1-II

however, and the trial court declared a mistrial on that count. Parker received concurrent high-end sentences on each conviction and consecutive 24-month deadly weapon enhancements, for a total confinement period of 246 months.

Parker now challenges the sufficiency of the evidence supporting his first degree kidnapping conviction.

ANALYSIS

Parker argues that the evidence was insufficient to support his kidnapping conviction because the jury rejected A.W.'s rape allegation and her remaining testimony described only a restraint that was incidental to the robbery.

Evidence of restraint that is merely incidental to the commission of another crime is insufficient to support a kidnapping conviction. *State v. Elmore*, 154 Wn. App. 885, 901, 228 P.3d 760, review denied, 169 Wn.2d 1018, 238 P.3d 502 (2010); see also *State v. Brett*, 126 Wn.2d 136, 166, 892 P.2d 29 (1995) (incidental restraint and movement of victim during course of another crime which has no independent purpose or injury is insufficient to establish kidnapping). Whether the kidnapping is incidental to the commission of another crime is a fact-specific determination. *Elmore*, 154 Wn. App. at 901. "Where there are sufficient facts to support a charge of two crimes, we cannot say as a matter of law that one charge is incidental to the other." *State v. Stirgus*, 21 Wn. App. 627, 631, 586 P.2d 532 (1978).

To convict Parker of first degree robbery, the jury had to find (1) a taking of personal property, (2) from the person or in another's presence, (3) by the use or threatened use of force, violence or fear of injury, (4) such force or fear being used to obtain or retain the property, (5) while armed with or displaying what appeared to be a deadly weapon. See *State v. Allen*, 94

No. 40793-1-II

Wn.2d 860, 863, 621 P.2d 143 (1980), *abrogated on other grounds by State v. Vladovic*, 99 Wn.2d 413, 662 P.2d 853 (1983). The kidnapping charge required the jury to find an abduction *to facilitate the commission of rape or robbery, with that abduction involving (1) a restriction of a person's movement, (2) without consent, by (3) secreting or holding the victim in a place where she is not likely to be found, or by (4) using or threatening to use deadly force. See Allen*, 94 Wn.2d at 863.

The kidnapping began when Parker grabbed A.W., tied her wrists, and forced her to lie down in the back of his car. A.W. testified that Parker drove about a half hour before stopping, and the location she identified as the scene of the robbery was outside the city limits. Once there, Parker untied A.W.'s wrists before robbing her at knifepoint.

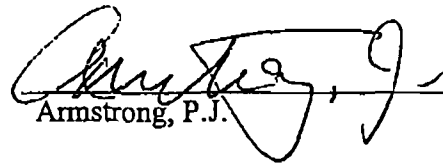
Parker argues that the jury discredited A.W.'s testimony when it rejected her rape allegation and that the remaining evidence supports a robbery but no independent restraint or abduction. We disagree that the jury's inability to agree on the rape charge constituted a *complete rejection of A.W.'s testimony*. *Physical evidence supported her testimony that she was bound, secreted, and driven to a remote location before the robbery began. See State v. Korum*, 120 Wn. App. 686, 707, 86 P.3d 166 (2004) (restraint was solely to facilitate robberies and not kidnapping partly because victims were not transported from their homes to remote spot where they were not likely to be found), *reversed in part on other grounds*, 157 Wn.2d 614, 141 P.3d 13 (2006); *Stirgus*, 21 Wn. App. at 631 (trial court correctly decided that transporting victim for a distance of four to six miles raised a jury question as to whether the kidnapping was incidental to a rape).

No. 40793-1-II

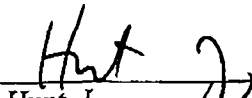
Here, the kidnapping and robbery occurred as separate events even though close in time. During the kidnapping, Parker used force to abduct A.W. by secreting her where she was not likely to be found; i.e., lying in the back seat of a car, and by taking her to a remote location. During the subsequent robbery, Parker used the threat of additional force to obtain A.W.'s personal property. *See Allen*, 94 Wn.2d at 863-64 (describing separate robbery and kidnapping under similar facts). Parker's movement and restraint of A.W. during her kidnapping was not incidental to her subsequent robbery, and the evidence was sufficient to support a separate kidnapping conviction.

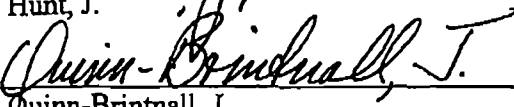
Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.


Armstrong, P.J.

We concur:


Hunt, J.


Quinn-Brintnall, J.

State of Washington, County of Pierce ss: I, Kevin Stock, Clerk of the
aforementioned court do hereby certify that this foregoing instrument is
a true and correct copy of the original now on file in my office.
IN WITNESS WHEREOF, I herunto set my hand and the Seal of said
Court this 27 day of January, 2014



Kevin Stock, Pierce County Clerk

By /S/Melissa Engler, Deputy.

Dated: Jan 27, 2014 9:05 AM



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APPENDIX “C”

Mandate

July 17 2012 1:56 PM

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

KEVIN STOCK
COUNTY CLERK
NO: 08-1-06144-4

STATE OF WASHINGTON,
Respondent,

v.

SHAMARR DERRICK PARKER,
Appellant.

No. 40793-1-II

MANDATE

Pierce County Cause No.
08-1-06144-4

The State of Washington to: The Superior Court of the State of Washington
in and for Pierce County

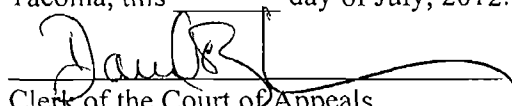
This is to certify that the opinion of the Court of Appeals of the State of Washington, Division II, filed on January 31, 2012 became the decision terminating review of this court of the above entitled case on June 5, 2012. Accordingly, this cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion. Costs and attorney fees have been awarded in the following amount:

Judgment Creditor: State of Washington \$7.34

Judgment Creditor: AIDF \$5773.26

Judgment Debtor: Shamarr Derrick Parker \$5780.60

IN TESTIMONY WHEREOF, I have hereunto set
my hand and affixed the seal of said Court at
Tacoma, this _____ day of July, 2012.


Clerk of the Court of Appeals,
State of Washington, Div. II



Cc: Hon. Bryan E. Chushcoff
Kathleen Proctor
Rebecca Wold Bouchey

State of Washington, County of Pierce ss: I, Kevin Stock, Clerk of the
aforementioned court do hereby certify that this foregoing instrument is
a true and correct copy of the original now on file in my office.
IN WITNESS WHEREOF, I herunto set my hand and the Seal of said
Court this 27 day of January, 2014



Kevin Stock, Pierce County Clerk

By /S/Melissa Engler, Deputy.

Dated: Jan 27, 2014 9:05 AM



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enter SerialID: D4AAECEB-F20F-6452-DB4024BD06CBEB03.

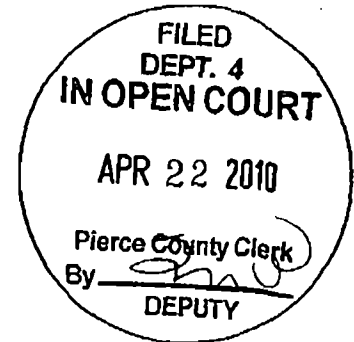
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APPENDIX “D”

Court’s Instructions to the Jury



08-1-06144-4 34175061 CTINJY 04-23-10



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 08-1-06144-4

vs.

SHAMARR DERRICK PARKER

Defendant.

COURT'S INSTRUCTIONS TO THE JURY

DATED this 20 day of April, 2010.
JUDGE

INSTRUCTION NO. /

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, stipulations, and the exhibits that I have admitted, during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict. Do not speculate whether the evidence would have favored one party or the other.

In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.

The order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions. During your deliberations, you must consider the instructions as a whole.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

INSTRUCTION NO. 2

The defendant has entered a plea of not guilty. The plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence.

INSTRUCTION NO. 3

The evidence that has been presented to you may be either direct or circumstantial.

The term “direct evidence” refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term “circumstantial evidence” refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 4

A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts.

You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

Case Number: 08-1-06144-4 Date: January 27, 2014

SerialID: D4A97A02-110A-9BE2-A91E9DD690AC2B18

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INSTRUCTION NO. 5

The defendant is not required to testify. You may not use the fact that the defendant has not testified to infer guilt or to prejudice him in any way.

Case Number: 08-1-06144-4 Date: January 27, 2014

SerialID: D4A97A02-110A-9BE2-A91E9DD690AC2B18

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INSTRUCTION NO. 6

A separate crime is charged in each count. You must decide each count separately.

Your verdict on one count should not control your verdict on any other count.

4/23/2018 0833 620391

Case Number: 08-1-06144-4 Date: January 27, 2014

SerialID: D4A97A02-110A-9BE2-A91E9DD690AC2B18

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INSTRUCTION NO. 7

A person commits the crime of Kidnapping in the First Degree when he intentionally abducts another person with intent to facilitate the commission of rape or robbery or flight thereafter.

4/23/2010 8933 620392

Case Number: 08-1-06144-4 Date: January 27, 2014

SerialID: D4A97A02-110A-9BE2-A91E9DD690AC2B18

Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 8

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.

INSTRUCTION NO. 9

Abduct means to restrain a person by either secreting or holding the person in a place where that person is not likely to be found or using or threatening to use deadly force.

Restraint or restrain means to restrict another person's movements without consent and without legal authority in a manner that interferes substantially with that person's liberty.

INSTRUCTION NO. 10

To convict the defendant of the crime of Kidnapping in the First Degree, as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about December 19, 2008 the defendant intentionally abducted A.W.;
- (2) That the defendant abducted A.W. with intent to facilitate the commission of rape or robbery; and
- (3) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. The crimes used in (2) are alternatives. You do not need to be unanimous as to any one of those crimes, so long as each of you finds one of the listed crimes was committed.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Case Number: 08-1-06144-4 Date: January 27, 2014

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INSTRUCTION NO. 11

A person commits the crime of Rape in the First Degree when he engages in sexual intercourse with another person by forcible compulsion, and he uses or threatens to use a deadly weapon or what appears to be a deadly weapon or kidnaps the other person.

INSTRUCTION NO. 12

Sexual intercourse means that the sexual organ of the male entered and penetrated the sexual organ of the female and occurs upon any penetration, however slight, or any penetration of the vagina or anus, however slight, by an object, including a body part, when committed on one person by another, whether such persons are of the same or opposite sex.

INSTRUCTION NO. 13

Forcible compulsion means physical force that overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to oneself or another person or in fear of being kidnapped or that another person will be kidnapped.

INSTRUCTION NO. 14

Deadly weapon means any weapon, device, instrument, substance, or article,
which under the circumstances in which it is used, attempted to be used, or threatened to
be used, is readily capable of causing death or substantial bodily harm.

INSTRUCTION NO. 15

Substantial bodily harm means bodily injury that involves a temporary but substantial disfigurement, or that causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or that causes a fracture of any bodily part.

INSTRUCTION NO. 16

To convict the defendant of the crime of Rape in the First degree, as charged in Count 11, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about December 19, 2008 the defendant engaged in sexual intercourse with A.W.;
- (2) That the sexual intercourse was by forcible compulsion;
- (3) That the defendant
 - (a) Used or threatened to use a deadly weapon or what appeared to be a deadly weapon; or
 - (b) Kidnapped A.W.; and
- (4) That any of these acts occurred in the State of Washington.

If you find from the evidence that elements (1), (2), and (4), and either of the alternative elements (3)(a) or (3)(b) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, you need not be unanimous as to which of alternatives (3)(a) or (3)(b) has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of the elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 17

The defendant is charged in Count II with Rape in the First Degree. If, after full and careful deliberation on this charge, you are not satisfied beyond a reasonable doubt that the defendant is guilty, then you will consider whether the defendant is guilty of the lesser crime of Rape in the Second Degree.

When a crime has been proved against a person, and there exists a reasonable doubt as to which of two or more degrees that person is guilty, he or she shall be convicted only of the lowest degree.

INSTRUCTION NO. 18

A person commits the crime of Rape in the Second Degree when he or she engages in sexual intercourse with another person by forcible compulsion.

INSTRUCTION NO. 19

To convict the defendant of the crime of Rape in the Second Degree, each of the following three elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 19th day of December, 2008, the defendant engaged in sexual intercourse with Ashley Weeks;
- (2) That the sexual intercourse occurred by forcible compulsion;
- (3) That this act occurred in the State of Washington.

If you find from the evidence that all of the elements, have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of the elements then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 20

A person commits the crime of Robbery in the First Degree when in the commission of a robbery or in *immediate flight therefrom* he is armed with a deadly weapon or displays what appears to be a firearm or other deadly weapon.

INSTRUCTION NO. 21

A person commits the crime of robbery when he or she unlawfully and with intent to commit theft thereof takes personal property from the person or in the presence of another against that person's will by the use or threatened use of immediate force, violence, or fear of injury to that person. The force or fear must be used to obtain or retain possession of the property or to prevent or overcome resistance to the taking, in either of which cases the degree of force is immaterial.

INSTRUCTION NO. 22

Theft means to wrongfully obtain or exert unauthorized control over the property or services of another, or the value thereof, with intent to deprive that person of such property or services or by color or aid of deception, to obtain control over the property or services of another, or the value thereof, with intent to deprive that person of such property or services.

INSTRUCTION NO. 23

A person is “armed with” a deadly weapon if a weapon is easily accessible and readily available for use, either for offensive or defensive purposes. There must be a nexus between the defendant, the crime, and the weapon.

INSTRUCTION NO. 24

To convict the defendant of the crime of Robbery in the First Degree, as charged in Count III, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about December 19, 2008, the defendant unlawfully took personal property from the person or in the presence of another;
- (2) That the defendant intended to commit theft of the property;
- (3) That the taking was against the person's will by the defendant's use or threatened use of immediate force, violence, or fear of injury to that person;
- (4) That the force or fear was used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking;
- (5) That in the commission of these acts or in immediate flight therefrom the defendant
 - (a) Was armed with a deadly weapon; or
 - (b) Displayed what appeared to be a firearm or other deadly weapon; and
- (6) That any of these acts occurred in the State of Washington.

If you find from the evidence that elements (1), (2), (3), (4), and (6), and either of the alternative elements (5)(a) or (5)(b), have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (5)(a) or (5)(b) has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

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On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of the elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 25

The defendant is charged in Count III with Robbery in the First Degree. If, after full and careful deliberation on this charge, you are not satisfied beyond a reasonable doubt that the defendant is guilty, then you will consider whether the defendant is guilty of the lesser crimes of Robbery in the Second Degree.

When a crime has been proved against a person, and there exists a reasonable doubt as to which of two or more degrees that person is guilty, he or she shall be convicted only of the lowest degree.

INSTRUCTION NO. 26

A person commits the crime of Robbery in the Second Degree when he or she commits
Robbery.

INSTRUCTION NO. 27

To convict the defendant of the crime of Robbery in the Second Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 19th day of December, 2008, the defendant unlawfully took personal property from the person or in the presence of another;
- (2) That the defendant intended to commit theft of the property;
- (3) That the taking was against that person's will by the defendant's use or threatened use of immediate force, violence or fear of injury to that person;
- (4) That force or fear was used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking or to prevent knowledge of the taking and;
- (5) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 28

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

INSTRUCTION NO. 29

When you begin deliberating, you should first select a presiding juror. The presiding juror's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. In your question, do not state how the jury has voted. The presiding juror should sign and date the question and give it to the judicial assistant. I will confer with the lawyers to determine what response, if any, can be given.

You will be given the exhibits admitted in evidence, these instructions, and verdict forms. Some exhibits and visual aids may have been used in court but will not go with you to the jury room. The exhibits that have been admitted into evidence will be available to you in the jury room.

When completing the verdict forms, you will first consider the crime of Kidnapping in the First Degree as charged in Count I. If you unanimously agree on a verdict, you must fill in the blank provided in the verdict Form – Count I the words “not

guilty” or the word “guilty,” according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form – Count I.

When completing the verdict forms, you will consider the crime of Rape in the First Degree as charged in Count II. If you unanimously agree on a verdict, you must fill in the blank provided in Verdict Form Count II the words “not guilty” or the word “guilty,” according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form Count II.

If you find the defendant guilty on Verdict Form Count II, do not use verdict form Count II - A. If you find the defendant not guilty of the crime of Rape in the First Degree, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of Rape in the Second Degree. If you unanimously agree on a verdict, you must fill in the blank provided in Verdict Form II - A the words “not guilty” or the word “guilty”, according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form Count II – A.

34C
First
~~Second~~
When completing the verdict forms, you will consider the crime of Robbery in the Degree as charged in Count III. If you unanimously agree on a verdict, you must fill in the blank provided in Verdict Form Count III the words “not guilty” or the word “guilty,” according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form Count III.

34C
form verdict form
Count III - A. If you find the defendant not guilty of the crime of ~~Rape~~ Robbery
in the First Degree, or if after full and careful consideration of the evidence you cannot

agree on that crime, you will consider the lesser crime of ~~Rape~~ ^{Robbery} in the Second Degree. If ^{all}
you unanimously agree on a verdict, you must fill in the blank provided in Verdict Form
III - A the words "not guilty" or the word "guilty", according to the decision you reach. If
you cannot agree on a verdict, do not fill in the blank provided in Verdict Form Count
III - A.

Because this is a criminal case, each of you must agree for you to return a verdict.
When all of you have so agreed, fill in the proper form of verdict or verdicts to express
your decision. The presiding juror must sign the verdict form(s) and notify the Judicial
Assistant. The Judicial Assistant will bring you into court to declare your verdict.

INSTRUCTION NO. 30

You will also be given special verdict forms for each count. If you find the defendant not guilty on any count, do not use the special verdict form for that count. If you find the defendant guilty on any count, you will then use the special verdict forms for that count and fill in the blank with the answer "yes" or "no" according to the decision you reach. Because this is a criminal case, all twelve of you must agree in order to answer a special verdict form. In order to answer "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no".

INSTRUCTION NO. 31

Sexual motivation means that one of the purposes for which the defendant committed the crime was for the purpose of his or her sexual gratification.

INSTRUCTION NO. 32

For purposes of a special verdict, the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the commission of the crime charged in Counts I, II, and III.

A person is armed with a deadly weapon if, at the time of the commission of the crime, the weapon is easily accessible and readily available for offensive or defensive use. The State must prove beyond a reasonable doubt that there was a connection between the weapon and the defendant. The State must also prove beyond a reasonable doubt that there was a connection between the weapon and the crime. In determining whether these connections existed, you should consider, among other factors, the nature of the crime and the circumstances surrounding the commission of the crime, including the location of the weapon at the time of the crime and the type of weapon.

A deadly weapon is an implement or instrument that has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death. The following instruments are examples of deadly weapons: blackjack, sling shot, billy, sand club, sandbag, metal knuckles, any dirk, dagger, pistol, revolver or any other firearm, any knife having a blade longer than three inches, any razor with an unguarded blade, and any metal pipe or bar used or intended to be used as a club, any explosive, and any weapon containing poisonous or injurious gas

INSTRUCTION NO. 33

Sal You will also be given ~~with~~ a form called "Interrogatories" for each count. If you find the defendant not guilty on a count, do not answer the interrogatories for that count. If you find the defendant guilty on a count, you will then complete the interrogatories form and fill in the blank provided for each question with the answer "yes" or "no" according to the decision you reach. In order to answer "yes" to a question on the Interrogatories form, you must unanimously agree that "yes" is the correct answer to that question. If you do not unanimously agree that "yes" is the correct answer to that question, you must answer "no" to that question.

State of Washington, County of Pierce ss: I, Kevin Stock, Clerk of the
aforementioned court do hereby certify that this foregoing instrument is
a true and correct copy of the original now on file in my office.
IN WITNESS WHEREOF, I herunto set my hand and the Seal of said
Court this 27 day of January, 2014



Kevin Stock, Pierce County Clerk

By /S/Melissa Engler, Deputy.

Dated: Jan 27, 2014 9:05 AM



Instructions to recipient: If you wish to verify the authenticity of the certified document that was transmitted by the Court, sign on to:

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PIERCE COUNTY PROSECUTOR

January 27, 2014 - 1:49 PM

Transmittal Letter

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Case Name: IN RE THE PRP OF: SHAMARR PARKER

Court of Appeals Case Number: 45163-8

Is this a Personal Restraint Petition? ☐ Yes ☐ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: ____

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): ____

Personal Restraint Petition (PRP)

☒ Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: ____

Comments:

No Comments were entered.

Sender Name: Heather M Johnson - Email: hjohns2@co.pierce.wa.us

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